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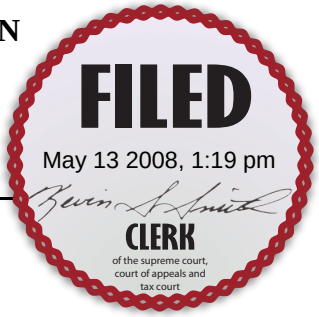

IN THE COURT OF APPEALS OF INDIANA

RAYMOND ELMER BENNETT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A05-0709-CR-514
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0504-FA-69

May 13, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Raymond Elmer Bennett (Bennett), appeals his conviction for possession of methamphetamine weighing three grams or more with intent to deliver, a Class A felony, Ind. Code § 35-48-4-1.

We affirm.

ISSUES

Bennett raises four issues on appeal which we consolidate into three issues and restate as follows:

(1) Whether the trial court properly instructed the jury;

(2) Whether the State presented sufficient evidence to support his conviction beyond a reasonable doubt; and

(3) Whether the trial court properly sentenced Bennett.

FACTS AND PROCEDURAL HISTORY

On December 13, 2004, Officer Jose Miller of the Goshen Police Department (Officer Miller) conducted a controlled buy for methamphetamine between a confidential informant and Joseph Brown (Brown) at a residence on Glenwood Avenue in Goshen, Indiana. After the deal was completed, Officer Miller field-tested the substance Brown had delivered and confirmed it was methamphetamine, weighing approximately 8.5 grams. In researching the information on the residence to get the search warrant for the home, it was determined that the residence belonged to Bennett and Anessa Bennett (Anessa) (collectively, the Bennetts).

The search warrant was executed the next day. Inside the residence, the Officers found five individuals: Brown, his girlfriend, and Anessa's three minor children. The Bennetts were not at home at the time of the execution of the search warrant; they were on a cruise that began on December 12 and had left the evening of December 10 for Michigan to await their flight to Florida. Brown, a friend of Anessa's, was asked to care for Anessa's children while they were on the cruise.

During their search of the garage's attic, the Officers found a surveillance camera directed at the driveway and connected to a television in the garage. The Bennett's bedroom door was locked. After gaining entrance to the master bedroom, the Officers found a large clear plastic baggy containing a large amount of a powdery substance underneath the bed. On a stand, they found pieces of paper with names and numbers written on them. Underneath the papers, they noticed a clear plastic bag, containing a white powdery substance, later identified as methamphetamine, weighing 1.72 grams. Also, a wicker basket standing on a shelf on the same stand contained either a white powdery substance or a white powdery residue. In a drawer underneath the shelf, the Officers found clear plastic baggies, some of them containing a white powdery substance. One of the baggies was tested and found to contain methamphetamine. An electronic scale, foil, and a glass tube with burnt residue on it were also in the drawer. A plastic bag found in the drawer held three clear plastic baggies, each containing amphetamine with a combined weight of 10.54 grams.

A search of the garage revealed more methamphetamine. Inside a locked cabinet, the Officers found a plastic container that held several clear plastic baggies with a white powdery

substance. The largest bag tested positive for methamphetamine and weighed 24.28 grams. There were nine smaller bags which had a combined weight of 30.22 grams. The substances in two of the smaller bags were tested and found to be methamphetamine. Another container in the cabinet contained plastic tubes with white powdery residue on the ends of the tubes. A second cabinet in the garage, when opened, held U.S. currency and four clear plastic bags, each containing a white powdery substance. Each of the plastic bags weighed more than 3 grams each. The substance in two of the plastic bags was tested and found to be methamphetamine. A tool case with Bennett's name on it held tin foil, several clear plastic bags, and a bag of rubber bands. The Officers also found an electronic scale and a Nescafe container on a workbench. Opening the container, the Officers discovered it contained hollow pin tubes with a white powdery substance and other paraphernalia. A small spiral bound notebook held two bags, one containing a white powdery substance and the other containing a powdery residue.

On April 21, 2005, the State filed an Information, charging Bennett with possession of methamphetamine weighing three grams or more with intent to deliver, a Class A felony, I.C. § 35-48-14-1. On July 16 through July 17, 2007, a jury trial was held. At the close of the evidence, the jury found Bennett guilty as charged. On August 9, 2007, after a sentencing hearing, the trial court sentenced Bennett to thirty-five years of imprisonment, with two years suspended.

Bennett now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Jury Instruction*

In order to convict Bennett of possession of methamphetamine weighing three grams or more with intent to deliver as a Class A felony, the State was required to prove beyond a reasonable doubt that he knowingly or intentionally possessed the methamphetamine, which weighed more than three grams, and intended to deliver it. I.C. § 35-48-4-1. Bennett now contends that the trial court abused its discretion by failing to separately instruct the jury on the intent to deliver element of the charge.

It is well established by our court that instructing the jury is within the discretion of the trial court. *White v. State*, 846 N.E.2d 1026, 1032 (Ind. Ct. App. 2006), *trans. denied*. Jury instructions are to be considered as a whole and in reference to each other; error in a particular instruction will not result in reversal unless the entire jury charge misleads the jury as to the law in the case. *Id*. As always, a timely objection is generally required to preserve an issue for appeal. *Id*. Here, Bennett does not deny that he failed to object to the proffered instruction; nonetheless, he claims the error is fundamental, and therefore subject to our review.

Fundamental error is defined as an error so prejudicial to the rights of a defendant that a fair trial is rendered impossible. *Id*. To be considered fundamental, an error "must constitute a blatant violation of basic principles, the harm, or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process." *Spears v. State*, 811 N.E.2d 485, 488 (Ind. Ct. App. 2004).

When determining whether a defendant suffered a due process violation based on an incorrect jury instruction, we look not to the erroneous instruction in isolation, but in the context of all relevant information given to the jury, including closing argument, and other instructions. *Boesch v. State*, 778 N.E.2d 1276, 1279 (Ind. 2002), *reh'g denied*. There is no resulting due process violation where all such information, considered as a whole, does not mislead the jury as to a correct understanding of the law. *Id*.

Here, the trial court instructed the jury separately on the law concerning the element of possession, be it actual or constructive, and on the knowingly element. The trial court did not issue a distinct instruction on the element of intent to deliver. As a result, Bennett now maintains that the failure to give a separate instruction on this element misled the jury. Bennett argues that the jury was effectively given the impression that if they found Bennett to be constructively in possession of the methamphetamine, then it was a "foregone conclusion that he also had the requisite intent to deliver under the offense charged." (Appellant's Brief p. 15).

The record reflects that the trial court initially advised the jurors to "consider all the instructions that are given to you as a whole and you are to regard each with the others given to you. Do not single out any certain instruction, sentence, or any individual point and ignore the others." (Appellant's App. p. 107). Thereafter, the trial court instructed the jury that:

> Before you may convict the defendant[], the [S]tate must have prove[n] beyond a reasonable doubt each of the following elements: The defendant[] (1) knowingly, (2) possessed with intent to deliver, (3) methamphetamine, pure or adulterated, (4) having a weight of three grams or more. If the [S]tate failed to prove each of there elements beyond a reasonable doubt, you should find the defendant[] not guilty.

(Appellant's App. p. 109). After instructing the jury separately on the elements of possession and knowingly, the trial court again reiterated that "[t]he [S]tate must prove each element of the crime by evidence that firmly convinces each of you and leaves no reasonable doubt." (Appellant's App. p. 114).

Furthermore, from our reading of the trial transcript, it is clear that Bennett's defense rested on his denial in possessing the contraband. He attempted to shift the culpability to Brown by alleging that Brown was the dealer who had brought all the contraband into his home. In particular, in closing argument, Bennett's counsel asserted that "the [S]tate hasn't given you enough to prove to you that Anessa and [Bennett] knowingly possessed this methamphetamine. . . . those are [Brown's] ledgers, those are [Brown's] containers that he put in that garage cabinet and locked." (Tr. pp. 368, 369).

Bennett now focuses this court's attention on *Majors v. State*, 735 N.E.2d 334 (Ind. Ct. App. 2000). In *Majors*, the defendant was charged with the attempted murder of a police officer. *Id*. at 337. In his post-conviction proceeding, Majors contended that the trial court had failed to instruct the jury on all the necessary elements the State had the burden of proving. *Id*. at 338. Specifically, he alleged that the trial court failed to advise the jury on the intent to kill element of the attempted murder charge. *Id*. We agreed. Relying on *Spradlin v. State*, 569 N.E.2d 948, 950 (Ind. 1991), we found error in the trial court's jury instructions. *Id*. The primary theory of Majors defense was that he was not the shooter. *Id*. at 339. Nevertheless, we stated even if the jury rejected the defense, the State, in order to

convict him, still had to prove that he acted with the specific intent to kill. *Id*. As the jury was not instructed accordingly, we reversed and remanded for a new trial. *Id*. at 340.

We find *Majors* to be inapposite to the case at hand. While the trial court in *Majors* was completely silent on a specific element of the charge that the State was required to prove beyond a reasonable doubt, here, the trial court specifically instructed the jury on all elements of Bennett's charge.

Based on our review of the jury instructions as a whole and all other relevant information given to the jury, we conclude that the trial court correctly stated the law in that the jury had to find not only that Bennett possessed the contraband but also that he intended to deliver it. The instructions clearly stated twice that the State had to prove each element of the crime beyond a reasonable doubt. Therefore, we do not find that the trial court erred—let alone made a fundamental error—in instructing the jury.

II. *Sufficiency*

Next, Bennett argues that the State failed to prove beyond a reasonable doubt that he possessed methamphetamine with intent to deliver. Specifically, he asserts that the State failed to prove that (1) he constructively possessed the methamphetamine and (2) he intended to deliver it.

Our standard of review with regard to sufficiency claims is well settled. In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. *Perez v. State*, 872 N.E.2d 208, 212-13 (Ind. Ct. App. 2007), *trans. denied*. We will consider only the evidence most favorable to the verdict and the

reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. *Id*. at 213. A conviction may be based upon circumstantial evidence alone. *Id*. Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id*.

In order to convict Bennett of possession of methamphetamine weighing three grams or more with intent to deliver as a Class A felony, the State was required to prove beyond a reasonable doubt that he knowingly or intentionally possessed the methamphetamine, which weighed more than three grams, and intended to deliver it.

A. *Constructive Possession*

Possession of contraband may be either actual or constructive. *Gee v. State*, 810 N.E.2d 338, 340 (Ind. 2004). Actual possession occurs when a person has direct physical control over the item. *Id*. Here, the parties agree that Bennett did not have actual possession of the methamphetamine. Therefore, to establish constructive possession, the State must show that the defendant had both the intent and the capability to maintain dominion and control over the contraband. *Id*. Proof of a possessory interest in the premises on which the contraband is found is adequate to show the capability to maintain dominion and control over the item. *Id*. However, in the instant case, Bennett was no longer in exclusive possession of the premises as he and Anessa had left three days prior for a cruise. Instead, Brown was staying in the house, caring for Anessa's minor children.

When possession of the premises is not exclusive, as in this case, then the inference of intent to maintain dominion and control over the methamphetamine must be supported by additional circumstances pointing to the defendant's knowledge of the nature of the controlled substances and their presence. *Id.* The additional circumstances have been shown by various means: (1) incriminating statements made by the defendant, (2) attempted flight or furtive gestures, (3) location of substances like drugs in settings that suggest manufacturing, (4) proximity of the contraband to the defendant, (5) location of the contraband within the defendant's plain view, and (6) the mingling of the contraband with other items owned by the defendant. *Id*. at 341.

The evidence favorable to the jury's verdict established that Bennett acknowledged that he lived at the house that the Officers searched and that he slept in the master bedroom. The majority of the methamphetamine that was discovered in the residence was found in the locked master bedroom and in locked containers in Bennett's garage. Inside the master bedroom, the officers also found, besides the methamphetamine, mail addressed to Bennett and to Anessa. At trial, Brown denied bringing any contraband into the residence. He testified that he had not entered the master bedroom or opened any of the locked containers in the garage.

Bennett focuses our attention to the fact that Brown was a known drug user and dealer and had resided in the house for two days prior to the execution of the search warrant. Adding to this evidence, he emphasizes that the contraband was easily transferable. We are not convinced. First, even faced with these facts, the jury found Brown's testimony credible

as they found Bennett guilty as charged. Second, Brown himself testified that he smoked methamphetamine with the Bennetts on a regular basis. As Brown's testimony established that the Bennetts were users themselves, it was not unreasonable for the jury to infer that the contraband found in the Bennett's residence properly belonged to the Bennetts.

B. *Intent to Deliver*

Intent to deliver for the purpose of I.C. § 35-48-4-1 can only be established by considering the behavior of the relevant actor, the surrounding circumstances, and the reasonable inferences to be drawn from them. *Dandridge v. State*, 810 N.E.2d 746, 750 (Ind. Ct. App. 2004), *trans. denied* (citing *Davis v. State*, 791 N.E.2d 266, 270 (Ind. Ct. App. 2003), *reh'g denied, trans. denied*). "Possessing a large amount of a narcotic substance is circumstantial evidence of intent to deliver. The more narcotics a person possesses, the stronger the inference that he intended to deliver it and not consume it personally." *Davis*, 791 N.E.2d at 270 (citing *Love v. State*, 741 N.E.2d 789, 792 (Ind. Ct. App. 2001)).

In the instant case, the Officers discovered methamphetamine in two main areas in Bennett's residence. In the locked master bedroom, on a stand underneath papers, they found a clear plastic bag which contained methamphetamine and which weighed 1.72 grams. In the stand's drawer, the Officers found clear plastic baggies, some of them containing a white powdery substance. One of the baggies was tested and found to contain methamphetamine, with a weight of 0.83 grams. An electronic scale, foil, and a glass tube with burnt residue on it were also located in the drawer. A plastic container in the drawer held three clear plastic baggies, each containing amphetamine with a combined weight of 10.54 grams.

In the garage, the Officers located even more methamphetamine. Inside a locked cabinet, they discovered a plastic container that held several clear plastic baggies with a white powdery substance. The largest bag tested positive for methamphetamine and weighed 24.28 grams. Nine smaller bags had a combined weight of 30.22 grams. The substances in two of the smaller bags were tested and were found to be methamphetamine. Another container in the cabinet contained plastic tubes with white powdery residue on the ends of the tubes. A second cabinet in the garage, when opened, held U.S. currency and four clear plastic bags, weighing more than 3 grams each. The substance in two of the plastic bags was tested and found to be methamphetamine.

At trial, Lieutenant Shawn Turner of the Goshen Police Department (Officer Turner) testified that the scales found in Bennett's home are indicative of a drug dealer because a "hard core user would never leave that much drug on the scale." (Tr. p. 260). Additionally, he informed the jury that the papers listing names and numbers that were found in Bennett's bedroom are consistent with the fact that drug dealers often keep ledgers, tracking their customers' usage and debt.

Based on the large amount of methamphetamine—well beyond the statutorily required three grams—found in Bennett's home and Officer Turner's testimony, the jury could reasonably infer that the methamphetamine was not solely for personal use but instead was intended to be sold to other users. In sum, we conclude that there is substantial evidence of probative value to support the jury's verdict. *See Perez*, 872 N.E.2d at 213.

III. *Sentencing*[1]

Lastly, Bennett disputes the trial court's imposition of an aggravated sentence, *i.e.*, thirty-five years of imprisonment, with two years suspended.[2] Sentencing decisions are within the trial court's discretion and will be reversed only for an abuse of discretion. *Matshazi v. State*, 804 N.E.2d 1232, 1237 (Ind. Ct. App. 2004), *trans. denied*. The trial court must determine which aggravating and mitigating circumstances to consider when increasing or reducing a sentence and is responsible for determining the weight to accord these circumstances. *Id*. When a defendant is sentenced to a term of imprisonment that is greater than the presumptive sentence, this court will examine the record to ensure that the trial court explained its reasons for selecting the sentence it imposed. *Id*. In particular, the sentencing court's statement of reasons must include: (1) an identification of the significant aggravating and mitigating circumstances; (2) specific facts and reasons that led the court to find the existence of such circumstances; and (3) an articulation demonstrating that the mitigating and aggravating circumstances have been evaluated and balanced in determining the sentence. *Bacher v. State*, 722 N.E.2d 799, 801 (Ind. 2000).

A. *Blakely Rights*

[1] We appreciate the State's Notice of Erratum, filed on March 17, 2008, conceding that a *Blakely* claim may be raised for the first time on appeal in accordance with our supreme court's decision in *Kincaid v. State*, 837 N.E.2d 1008, 1010 (Ind. 2005) (stating that a defendant may raise a *Blakely* claim on direct appeal even if he did not raise such an objection before the trial court, since appellate courts consider other allegations of sentencing error such as failure to consider a proper mitigating circumstance without requiring an objection before the trial court).

As an initial matter, we note that Bennett argues that the trial court's finding of aggravating circumstances violated his rights under *Blakely v. Washington*, 542 U.S. 296, 124 C. St. 2531 (2004). In *Blakely*, the United States Supreme Court stated, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Blakely*, 542 U.S. at 301 (quoting *Apprendi v. New Jersey*, 530 U .S. 466, 490 (2000)). "Under *Blakely*, a trial court may not enhance a sentence based on additional facts, unless those facts are either (1) a prior conviction; (2) facts found by a jury beyond a reasonable doubt; (3) facts admitted by the defendant; or (4) facts found by the sentencing judge after the defendant has waived *Apprendi* rights and consented to judicial factfinding." *Robertson v. State*, 871 N.E.2d 280, 286 (Ind. 2007).

The presumptive sentence for a Class A felony is thirty years, with not more than twenty years added for aggravating circumstances or not more than ten years subtracted for mitigating circumstances. I.C. § 35-50-2-4 (2004). Here, the trial court imposed an aggravated sentence of thirty-three years executed, with two years suspended. In support of its sentence, the trial court found the following four aggravators: (1) Bennett's criminal history consisting of two misdemeanor convictions and two violations of probation; (2) Bennett had another case pending; (3) Bennett permitted a drug user to babysit his children; and (4) Bennett's possession of illicit drugs while children were present in the residence. The trial court found as mitigators: (1) Bennett's minimal criminal history and (2) "all

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[2] As the offenses of which Bennett was convicted occurred before the new Indiana sentencing statutes became

mitigators mentioned by counsel for [Bennett]." (Appellant's App. p. 63). The trial court added that weighing the aggravators and mitigators, any aggravator "taken individually warrants the imposition of a five year enhanced sentence." (Appellant's App. p. 63).

We find that, with the exception of the first aggravator, all other aggravators are invalid under *Blakely*. None of these aggravators were submitted to the jury, and during the sentencing hearing, Bennett did not admit to them or consented to judicial fact-finding. Accordingly, one valid aggravator—Bennett's criminal history—remains. In light of the trial court's statement that a single valid aggravator warrants the imposition of an aggravated sentence, we can say with confidence that the sentence would stand if remanded for re-sentencing. *See Means v. State*, 807 N.E.2d 776, 788 (Ind. Ct. App. 2004).

B. *Imposition of an Aggravated Sentence*

Next, Bennett contends that his sentence is inappropriate in light of the nature of the offense and character of the offender. Pursuant to Appellate Rule 7(B), we may revise a sentence authorized by statute if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and character of the offender. Sentence review under Appellate Rule 7(B) is very deferential to the trial court's decision and we refrain from merely substituting our judgment for that of the trial court. *Felder v. State*, 870 N.E.2d 554, 559 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. *Id*.

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effective in April 2005, we will apply the presumptive sentencing scheme.

With regard to the nature of the crime, we were struck by the enormous amount of methamphetamine found in Bennett's residence. The total amount was well beyond the statutory required minimum of three grams for a Class A felony. The ledgers and notes found in the residence indicate that he was dealing methamphetamine out of a home where minor children were present.

Considering Bennett's character, we first mention his minor criminal history consisting of two misdemeanor convictions for operating a vehicle while intoxicated in 1998 and 2003 respectively. Both times, he was placed on probation, which he violated. Furthermore, we note that at the time of the instant case, Bennett had a pending charge for possession of cocaine or a narcotic drug, a Class D felony. After he bonded out, he found gainful employment and all screenings for illegal substances that he submitted to in the course of his employment were negative. Second, even though the largest amount of methamphetamine was locked in containers, we note that some contraband was out in the open in a residence where minor children live. Moreover, while Bennett and his wife were on a cruise, the children were left at home under the supervision of another drug abuser. Based on the totality of the facts, we find that an aggravated sentence of thirty-five years with two years suspended is appropriate in light of Bennett's character and nature of his offense.

Nevertheless, as a final argument, Bennett claims that, if we were to conclude that his sentence is appropriate, his placement at the Department of Correction for thirty-three years is not appropriate. The place that a sentence is to be served is an appropriate focus for

application of our review and revise authority. *Biddinger v. State*, 868 N.E.2d 407, 414 (Ind. 2007). Here, Bennett requests us to reduce his "Department of Correction[] portion of his sentence . . . to allow him to meet his child support obligations." (Appellant's Brief p. 25). We agree with the State that the evidence of the large scale methamphetamine operation warrants incarceration. Therefore, we refuse to revise Bennett's sentence.

CONCLUSION

Based on the foregoing, we conclude that (1) the trial court properly instructed the jury; (2) the State presented sufficient evidence to support Bennett's conviction beyond a reasonable doubt; and (3) the trial court properly sentenced Bennett.

Affirmed.

BAKER, C.J., and ROBB, J., concur.